No. _____

In The

Supreme Court of the United States

GREGORY BANNISTER,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Seventh Judicial District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a jailer's question outside of the context of the booking process, about what a prisoner is "in jail for" reasonably likely to elicit an incriminating response in violation of the prisoner's Fifth Amendment right to remain silent, as the Fifth Circuit has held, and contrary to the decision below?

2. Does the Texas Court of Appeals' holding that Petitioner's Sixth Amendment right to counsel had not attached to aggravated assault, a lesser included offense of the charged offense of intoxication manslaughter, conflict with this Court's decision in ***Cobb v. Texas*** that the Sixth Amendment right to counsel is "prosecution-specific"?

3. Does the Texas Court of Appeals' use of a Fifth Amendment "custodial interrogation" standard to reject Petitioner's Sixth Amendment claim violate this Court's decisions adopting a "deliberate elicitation of incriminating information" standard for such claims?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Gregory Bannister, respectfully prays that a Writ of Certiorari issue to review the judgment of the Texas Court of Appeals for the Seventh Judicial District entered on September 29, 2006.

OPINION BELOW

The opinion of the Texas Court of Appeals for the Seventh Judicial District affirming this conviction, ***Bannister v. State***, 07-04-479-CR (Tex.App. – Amarillo, Sept. 29, 2006), is not reported and appears at *Pet. App.* 1-15. The order of the Texas Court of Criminal Appeals denying discretionary review and the order denying rehearing to the denial of discretionary review are also unreported, and appear at *Pet. App.* 20.

JURISDICTION

The Texas Court of Appeals for the Seventh Judicial District issued its decision on September 29, 2006. The Texas Court of Criminal Appeals denied discretionary review on February 28, 2007, and denied Petitioner's motion for rehearing on April 18, 2007. This petition is filed within 90 days of the latter date.

This Court's jurisdiction is based upon 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part that, "No person . . . shall be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself."

The Sixth Amendment to the United States Constitution provides in pertinent part that, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part that, "No State shall . . . deprive any person of liberty . . . without due process of law."

STATEMENT OF THE CASE

On March 7, 2003, Petitioner was indicted for intoxication manslaughter. The indictment alleged that he caused the death of B.J. Mitchell by striking him with his motor vehicle while intoxicated due to ingestion of alcohol, a controlled substance, a drug, or a dangerous drug. *Pet. App.* 18. In November of 2003, while Petitioner was in custody at the Lamb County Jail and being taken to the health clinic by Deputy Shaun Wilson, Wilson asked Petitioner "what he was incarcerated in our jail for." *Pet. App.* 21-22; 31-32. According to Wilson, Petitioner replied that "[H]e was in jail for . . . Intoxicated Manslaughter at that time, and he later on said that he didn't understand why he was being charged with Intoxicated Manslaughter if he hadn't been drinking but had used cocaine." *Pet. App.*

22; 31-32; 33. Although Wilson knew that Petitioner had been incarcerated since September of 2003, he claimed not to have known that Petitioner was represented by counsel.[1] *Pet. App.* 22.

Wilson admitted that he asked Petitioner at least two questions: (1) why was he in custody; and (2) was he the one who was involved in the manslaughter case in the Earth area.[2] *Pet. App.* 26; 28.

In February of 2004, less than three months after making these statements to Wilson, Petitioner was indicted for the lesser-included offense of aggravated assault. The indictment alleged that Petitioner caused serious bodily injury to B.J. Mitchell by striking him with his motor vehicle as a result of operating his motor vehicle without sufficient sleep and as a result of the introduction of cocaine into his body. *Pet. App.* 16-17. In a mid-trial colloquy, the prosecutor conceded that there was "no question" that the offenses of aggravated assault and intoxication manslaughter arose out of the same transaction. *Pet. App.* 24.

On the second day of Petitioner's aggravated assault trial, Wilson testified over Petitioner's Fifth and Sixth Amendment objections that Petitioner told him "he was in jail for . . . Intoxicated Manslaughter . . . and he later on

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[1] Whether Wilson knew Petitioner had counsel is of no moment because, as this Court has made clear, "Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. . . . One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court)." ***Michigan v. Jackson***, 475 U.S. 625, 634 (1986).

[2] Wilson was unable to remember whether he asked Petitioner any more questions, and if so, what he asked him. *Pet. App.* 27-28.

said that he didn't understand why he was being charged with Intoxicated Manslaughter if he hadn't been drinking but had used cocaine." *Pet. App.* 31-32; 33. In its final argument, the prosecution repeatedly referred to Petitioner's statements to Wilson in urging jurors to convict. For example, the prosecution argued in its opening argument: "You also have Shaun Wilson and Brian Cantrell[3] telling you that. Yeah, he used cocaine." *Pet. App.* 34. And, in rebuttal, the prosecution argued: "You've got Shaun Wilson, you've got Brian Cantrell saying, yes. You've got . . . you know the defendant used cocaine, you know he was coming off cocaine." *Pet. App.* 34. Petitioner was convicted of aggravated assault and the trial court assessed his punishment at 30 years in prison. *Pet. App.* 2; 35.

PRESERVATION OF FEDERAL QUESTIONS

Whether the admission of Petitioner's statements violated the Fifth and Sixth Amendments to the United States Constitution was raised by his timely objections when these statements were offered at trial. *Pet. App.* 4; 23; 24-25. On direct appeal, the court of appeals rejected Petitioner's Fifth and Sixth Amendment claims, based on its reading of this Court's decisions in ***Rhode Island v. Innis*** and ***Texas v. Cobb***. *Pet. App.* 5; 9-10. Petitioner relied on the Fifth and Sixth Amendments, and this Court's decisions in ***Innis***, ***Fellers***, and ***Cobb***, in unsuccessfully

[3] Cantrell, an inmate in the Lamb County Jail who overheard Petitioner's responses to Wilson's questions, also testified at trial over Petitioner's objections. *Pet. App.* 3-4; 30-31.

seeking review of the court of appeals' decision in the Court of Criminal Appeals. *Pet. App.* 36.

REASONS FOR GRANTING THE PETITION

I. PETITIONER'S FIFTH AMENDMENT CLAIM

A. The Decision Below is in Conflict with This Court's Decisions in *Innis* and *Miranda*

Rejecting the claim that Deputy Wilson's questioning of Petitioner was not reasonably likely to elicit an incriminating response, the court of appeals wrote:

> We do not agree the facts presented here are more similar to cases cited by [Petitioner] where reviewing courts have found police conduct was the functional equivalent of express questioning. *The distinguishing factor is that in those cases the statements were made to officers who were investigating the offense for which the defendant was in custody.*
>
> By contrast, evidence shows Wilson had no involvement in the investigation of the charges against [Petitioner]. The statements to which Wilson testified were made some eighteen months after the May 2002 death of the bicyclist.

Pet. App. at 7-8 (emphasis added) (footnote omitted).

The court of appeals' holding finds no support in this Court's decisions in ***Rhode Island v. Innis***, 446 U.S. 291 (1980), or ***Miranda v. Arizona***, 384 U.S. 436 (1966). As this Court made clear in ***Innis***, the ***Miranda*** safeguards come into play:

> whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under ***Miranda*** refers not only to express questioning, *but also to any words or actions on the part of the police* (other than those normally attendant to arrest and custody) *that the police know are reasonably likely to elicit an incriminating response from the suspect.* The latter portion of this definition focuses primarily on the perceptions of the suspect, rather than the intent of the police. *This focus reflects the fact that the* ***Miranda*** *safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police.*

Rhode Island v. Innis, 446 U.S. at 301 (emphasis added) (footnotes omitted).

This language reveals that ***Miranda*** makes no distinction between "coercive police practices" on the part of police investigating the crime for which the defendant is in custody, and officers or jailers, such as Deputy Wilson, who do not have investigative intent. The court of appeals' contrary holding not only sacrifices the Fifth Amendment's fundamental constitutional protections on the altar of a distinction that, like cotton candy, melts at the touch, it encourages investigating police officers to have jailers interrogate suspects and do their dirty work for them, knowing that this insulates a Fifth Amendment and Sixth Amendment violation from review. In rejecting Petitioner's Fifth Amendment claim on so flimsy a reed, one that carries with it the seeds of untold mischief, the court of appeals' has decided an important question of federal law

in conflict with this Court's decisions in ***Innis*** and ***Miranda***, and that warrants the granting of certiorari.

B. The Decision Below is at Odds with the Fifth Circuit's Decision in *Webb*

That Wilson's questioning of Petitioner as to what he was in jail for constituted interrogation likely to elicit an incriminating response, consistent with this Court's teachings in ***Innis***, is confirmed by ***United States v. Webb***, 755 F.2d 382 (5th Cir. 1985). *Pet. App.* 6; 8. In ***Webb***, the defendant was arrested for murder on a federal reservation and booked into the county jail. To determine where in the jail population to place Webb, a jailer asked him, "What kind of shit did you get yourself into?" According to the jailer, Webb's "surprising" reply was, "I murdered my son and buried him in the desert." ***Id.*** at 382. The Fifth Circuit concluded that even though the jailer's question to Webb might have been innocuous, the jailer "expressly questioned Webb, and that questioning falls within the Supreme Court's definition of interrogation." ***Id.*** at 389.

The reasoning and analysis in ***Webb*** buttress the conclusion that Wilson's questioning of Petitioner in the jailer-inmate context constituted interrogation reasonably likely to elicit an incriminating response. Wilson's inquiry was nowhere near as innocuous as a question such as "What court is your case in?" or "When do you go back to court?" At the end of the day, there is simply no meaningful distinction between the inquiry in ***Webb*** – "What kind of shit did you get yourself into?" – and Wilson's inquiry in the case at bar – "What are you in jail for?" This conflict between the Fifth Circuit's holding in ***Webb*** and the decision below is especially pernicious because it means

that the state and federal courts with jurisdiction over Texas disagree about the meaning of the federal Constitution. This Court should grant certiorari to resolve the split.

The conclusion that Wilson's questioning of Petitioner as to what he was in jail for constituted interrogation likely to elicit an incriminating response, also finds support in ***Etheridge v. Johnson***, 49 F.Supp.2d 963, 982-983 (S.D. Tex. 1999), *COA ref'd*, 209 F.3d 718 (5th Cir. 2000) (table) (*op. not design. for pub.*). In ***Etheridge***, a police officer asked a murder suspect if he knew why he was under arrest and the latter replied that, "I know that I'm under arrest for killing that 15-year-old girl . . . I am sorry for what I did." Although the Texas Court of Criminal Appeals found that the suspect's initial response, "I know that I'm under arrest for killing that 15-year-old girl," was the result of custodial interrogation, it held that his subsequent reply admitting the offense was not the product of custodial interrogation but rather "an admission of guilt beyond the scope of the arresting officer's inquiry." ***Etheridge v. State***, 903 S.W.2d 1, 15 (Tex.Crim.App. 1994). On federal habeas review, the district court disagreed with the Texas Court of Criminal Appeals' assessment, concluding that, "[Officer] Day asked Etheridge if he understood why he was under arrest. An officer should know that this question might elicit an incriminating response. Because this court concludes that officer Day should have known that his question was likely to elicit an incriminating response, officer Day conducted a custodial interrogation." ***Etheridge v. Johnson***, 49 F.Supp.2d at 982. The district court went on to reject the State's contention that there must be a "causative link" between the question asked by a police officer and the incriminating response given by suspect because "the ***Innis*** definition of

custodial interrogation . . . does not cut so finely." ***Id.*** at 982-983. Again, there is no difference between the inquiry in ***Etheridge*** – "Do you know why you're under arrest?" – and Wilson's inquiry in this case – "What are you in jail for?"

This body of federal authority cannot be squared with the court of appeals' holding that Petitioner's statements were not the product of questioning that Wilson should have known was reasonably likely to elicit an incriminating response. Because Wilson's exchanges with Petitioner were questioning that by its nature invited an incriminating response and not "a dialogue to which no response was invited," ***Rhode Island v. Innis***, 446 U.S. at 302, this Court should grant certiorari, agree with the decisions in ***Webb*** and ***Etheridge***, and reverse.

C. The Court of Appeals' Analysis of Petitioner's Fifth Amendment Claim Improperly Focused on Wilson's Intent and not on Petitioner's Perception

In holding that Wilson's express questioning was not "interrogation," the court of appeals reasoned that "Wilson's failure to record the statement or report it to investigators or the prosecutor further indicate he had no intent to act in an investigative capacity." *Pet. App.* 8-9. This focus on Wilson's intent, not Petitioner's perception, squarely conflicts with this Court's holding in ***Innis*** that the definition of interrogation "focuses primarily on the perceptions of the suspect, rather than the intent of the police." 446 U.S. at 301. In addition, the court of appeals refused to acknowledge what many other courts have held: express questioning by any state actor directed to any defendant involving *any* aspect of his pending criminal

case, *regardless of how it is phrased*, particularly by a jailer to one of his prisoners, is itself reasonably likely to elicit an incriminating response. **See e.g., *United States v. Minkowitz***, 889 F.Supp. 624, 628 (E.D. N.Y. 1995) ("The closer the connection between the crime in question and the information sought, the stronger the inference that the agent should have known that his inquiry was 'reasonably likely to elicit an incriminating response from the suspect.'"); **see also *United States v. Parra***, 2 F.3d 1058, 1068 (10th Cir. 1993) (INS agent's questioning of defendant about his true name to link defendant to his "incriminating immigration file" constituted improper interrogation); ***United States v. Doe***, 878 F.2d 1546, 1551 (1st Cir. 1989) ("questions about citizenship, asked on the high seas, of a person present on a *foreign* vessel with drugs aboard," was improper interrogation); ***United States v. Disla***, 805 F.2d 1340, 1347 (9th Cir. 1986) (defendant in drug case subjected to improper interrogation "where the question as to where Disla lived was related to an element (possession) of the crime that the officer had reason to suspect Disla committed"). This Court should grant certiorari to resolve the conflict between theses cases and the decision below.

Moreover, in improperly focusing on Wilson's intent rather than Petitioner's perceptions, the court of appeals turned a blind eye to the very setting in which these events transpired, as well as to the content and context of the questioning.[4] These factors provide compelling

[4] This Court can take judicial notice that every jail or penitentiary has rules that require every inmate or prisoner to obey any order from a guard or jailer, including the duty to answer questions put to him by a guard or jailer. **See e.g.,** *Texas Department of Corrections: Institutional Division Inmate Handbook*, Chapter III "Standards of Behavior," Sec.

(Continued on following page)

evidence that Wilson's questioning of Petitioner was not the "idle chatter" the court of appeals made it out to be, but rather conduct reasonably likely to elicit an incriminating response. **See *United States v. Minkowitz***, 889 F.Supp. at 624 ("Both the content and context of the inquiry inform the court's determination" because "the relationship of the question asked to the crime suspected is highly relevant."); ***Etheridge v. Johnson***, 49 F.Supp.2nd at 982 ("Day asked Etheridge if he understood why he was under arrest. An officer should know that this question might elicit an incriminating response. Because this court concludes that officer Day should have known that his question was likely to elicit an incriminating response, officer Day conducted a custodial interrogation.").

D. The Court of Appeals' Analysis Ignored this Court's Mandate that "Interrogation" is a Question of Law, not Fact

The court of appeals also reasoned that Wilson's questioning of Petitioner was not reasonably likely to elicit an incriminating response because "[b]oth witnesses to the conversation who testified asserted appellant's statement concerning cocaine use was not in response to any questions from Wilson." *Pet. App.* 6. (footnote omitted). The court of appeals' reliance on these "facts" will not support the weight rested upon it because whether a jailer and his prisoner "believe" Petitioner's statements were not in

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N-18: "It is the intent of the TDCJ to have all offenders immediately comply with lawful instructions or orders. An offender will obey the staffs' orders at all times. . . ." (*available at* www.tdcj.state.tx.us/publications/id/offender-handbook).

response to questioning from the jailer is of no moment. Whether Wilson's repeated questioning of Petitioner constituted "interrogation" so as to render his oral statement inadmissible is a question of law, not a question of fact entitled to any measure of deference on appeal. **See *Arizona v. Fulminante***, 499 U.S. 279, 287 (1991); ***Miller v. Fenton***, 474 U.S. 104, 110 (1985). By reducing the legal question of whether Wilson's repeated questioning was "interrogation" to a question of fact that ultimately turns on the "belief" of a jailer and his prisoner, the court of appeals afforded unwarranted deference to this irrelevant testimony. Moreover, it abdicated its responsibility to conduct a *de novo* review of this important question of constitutional law contrary to this Court's holdings in ***Fulminante*** and ***Miller***.

The court of appeals' terse rejection of Petitioner's Fifth Amendment contention also ignored his claim that it was the prosecution's burden to show that Petitioner's incriminating response that he used cocaine was not the product of Wilson's initial questioning. This Court has consistently held that the prosecution must shoulder the burden of proving that there is a sufficiently isolating "break in the chain of events" between a suspect's initial statement and any subsequent statement. **See *Darwin v. Connecticut***, 391 U.S. 346, 349 (1968); ***Beecher v. Alabama***, 389 U.S. 35, 38 (1968); ***Clewis v. Texas***, 386 U.S. 707, 710 (1967). Given the sheer lack of any intervening circumstances supplying a "break in the chain of events" between Petitioner's initial response and his subsequent incriminating reply, the prosecution failed to shoulder its burden of proving that Petitioner's second statement was not the product of his first. **See *Brown v. Illinois***, 422 U.S. 590, 604 (1975) ("no intervening event of

significance whatsoever" to break casual connection between initial illegality and consent). Accordingly, this Court should grant certiorari and reverse.

II. PETITIONER'S SIXTH AMENDMENT CLAIM

A. The Decision Below is in Conflict with this Court's Decision in *Cobb*

Petitioner also argued that the admission of Wilson's testimony violated his Sixth Amendment right to counsel pursuant to ***Fellers v. United States***, 540 U.S. 519, (2004). In ***Fellers***, this Court held that the Sixth Amendment is violated when police "deliberately elicit" incriminating information from the defendant after his indictment and in the absence of counsel, *even though officers do not "interrogate" the defendant* and regardless of whether the statement is voluntary, because the "Sixth Amendment provides a right to counsel even when there is no interrogation and no Fifth Amendment applicability." ***Id.*** at 522 (emphasis added); **see also *Massiah v. United States***, 377 U.S. 201, 206 (1964) (accused's Sixth Amendment right to counsel violated "when there [is] used against him at his trial evidence of his own incriminating words, which federal agents . . . deliberately elicited from him after he had been indicted and in the absence of his counsel"). The court of appeals did not discuss or distinguish ***Fellers***, and it admitted that "the State's brief contains no discussion of appellant's Sixth Amendment claim." *Pet. App.* 9.

Instead, the court of appeals held that Petitioner's claim failed because the Sixth Amendment right to counsel is offense-specific. Citing ***Texas v. Cobb***, 532 U.S. 162 (2001), the court of appeals reasoned that "[e]ven if Wilson's

conversation with [Petitioner] were reasonably likely to elicit an incriminating response, it concerned the charge of intoxication manslaughter. Admission of that evidence in his trial for aggravated assault, for which he had apparently not yet been indicted, would not be barred under the Sixth Amendment." *Pet. App.* 9-10 (footnote omitted). But this misguided reliance on ***Cobb*** does no more than honor its holding in the breach. The court of appeals ignored this Court's further statement that the Sixth Amendment right to counsel could also be described as "'prosecution-specific,' insofar as it *prevents discussion of charged offenses as well as offenses that . . . could not be the subject of a later prosecution.*" ***Texas v. Cobb***, 532 U.S. at 173 n. 3 (emphasis added). Because the lesser included offense of aggravated assault could not have been the subject of a later prosecution when Wilson deliberately elicited Petitioner's incriminating statement, the Sixth Amendment barred its use in his aggravated assault trial. The court of appeals' contrary holding is squarely in conflict with ***Cobb***.

B. This Court's Double Jeopardy Decisions Hold that A Conviction for a Lesser Included Offense Bars Re-Trial for the Greater

Under ***Cobb***, whether Petitioner's right to counsel had attached to the uncharged offense of aggravated assault turns on whether aggravated assault is a "species of lesser included offense" of intoxication manslaughter. This Court's double jeopardy precedent, which defines the "lesser included offense" concept shows that the answer is yes.

In ***Brown v. Ohio***, 432 U.S. 161, 167-168 (1977), this Court reaffirmed the fundamental principle that the Double Jeopardy Clause of the Fifth Amendment prohibits

the State from prosecuting a defendant for a greater offense after he has been convicted of a lesser included offense. In ***Brown***, the defendant was convicted of joy-riding and was assessed a 30-day jail term. After he was released, he was indicted for a second joy-riding violation and auto theft, and pled guilty to the latter offense, preserving his claim that jeopardy barred his conviction for the greater offense of auto theft. Although the court of appeals agreed with Brown that joyriding was a lesser included offense of auto theft, and that the two offenses were the same for jeopardy purposes, the court of appeals rejected his jeopardy claim because they were not based on the same act or transaction. ***Id.*** at 163-164.

This Court granted *certiorari* to consider the question whether "auto theft and joyriding, a greater and lesser included offense under Ohio law, constitute the 'same offence' under the Double Jeopardy Clause." ***Id.*** at 164. Relying on ***Blockburger v. United States***, 284 U.S. 299 (1932), this Court agreed with the Ohio Court of Appeals that the lesser included offense of joyriding and the greater included offense of auto theft were the "same offense" under ***Blockburger*** because, "As is invariably true of a greater and lesser included offense, the lesser offense – joyriding – requires no proof beyond that which is required for conviction of the greater – auto theft. The greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." ***Id.*** at 168. Accordingly, the Court held that, "[w]hatever the sequence may be, the Fifth Amendment forbids prosecution . . . for a greater and lesser included offense." ***Id.*** at 169. **See also *Parrish v. State***, 869 S.W.2d 352, 354 (Tex.Crim.App. 1994) (greater-inclusive

and lesser-included offenses are the same for jeopardy purposes).

This Court has adhered to the reasoning in ***Brown*** in subsequent decisions such as ***Harris v. Oklahoma***, 433 U.S. 682 (1977) (*per curiam*) and ***Illinois v. Vitale***, 447 U.S. 410 (1980). In ***Harris***, this Court held that a prosecution for the lesser included offense of robbery by firearm was barred by double jeopardy where the defendant had been tried and convicted for felony murder based on the same underlying felony. And, in ***Vitale***, this Court reaffirmed the tenet that "[u]nder ***Brown*** . . . a conviction on a lesser-included offense bars subsequent trial on the greater offense." ***Id.*** at 421.

Moreover, in ***United States v. Dixon***, 509 U.S. 688 (1993), this Court relied on ***Harris*** and ***Vitale*** to hold that a conviction for criminal contempt for violating a court order not to "commit any criminal offense" barred the defendant from being prosecuted for the offense of possession with intent to distribute cocaine. As this Court wrote:

> In this situation, in which the contempt sanction is imposed for violating the order through commission of the incorporated drug offense, the later attempt to prosecute Dixon for the drug offenses resembles the situation that produced our judgment in ***Harris*** . . . There we held that a subsequent prosecution for robbery with a firearm was barred by the Double Jeopardy Clause, because the defendant had already been tried for felony murder based on the same underlying felony. . . . So too here, the "crime" of violating a condition of release cannot be abstracted from the "element" of the violated condition." The ***Dixon*** court order incorporated the entire governing criminal code in the same manner as the

> ***Harris*** felony murder statute incorporated the several enumerated felonies. *Here, as in* ***Harris****, the underlying substantive criminal offense is "a species of lesser included offense."*

United States v. Dixon, 509 U.S. at 698 (emphasis added) (footnotes and citations omitted).

C. The Uncharged Offense of Aggravated Assault is "a Species of Lesser Included Offense" of the Charged Offense of Intoxication Manslaughter

Viewed against the backdrop of ***Brown***, ***Harris***, ***Vitale***, and ***Dixon***, the offense of aggravated assault is "a species of lesser included offense" of intoxication manslaughter, the crime with which Petitioner was charged. Because the then-uncharged offense of aggravated assault could not have been the subject of a later prosecution, Petitioner's Sixth Amendment right to counsel had also attached to that offense when Wilson questioned him.

The indictment returned against Petitioner alleging the offense of intoxication manslaughter,[5] the offense for which the court of appeals acknowledged Petitioner's right to counsel had attached, alleged in pertinent part that he:

- operate[d] a motor vehicle in a public place while intoxicated by not having the normal use of mental or physical faculties

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[5] TEXAS PENAL CODE, Sec. 49.08(a)(1) & (2), provides that a person commits the offense of intoxication manslaughter if he "operates a motor vehicle in a public place . . . and is intoxicated and by reason of that intoxication causes the death of another by accident or mistake."

- by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body
- and did by reason of such intoxication cause the death of another, namely, B.J. Mitchell
- by accident or mistake, to wit: by driving said motor vehicle into the person of B.J. Mitchell.

The indictment under which Petitioner was tried for aggravated assault,[6] the offense which the court of appeals found Petitioner's right to counsel had not attached at the time he was questioned by Wilson, alleged in pertinent part that he:

- intentionally, knowingly or recklessly cause[d] serious bodily injury to B.J. Mitchell
- by failing to control a motor vehicle
- or by driving a motor vehicle without sufficient sleep
- as a result of the introduction of cocaine into his body
- and thereby caused his motor vehicle to collide with B.J. Mitchell.

Because aggravated assault can be "established proof of the same or less than all the facts required to establish

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[6] TEXAS PENAL CODE, Sec. 22.02(a)(1), provides that a person commits the offense of aggravated assault if he commits the offense of assault and "causes serious bodily injury to another."

the commission of" intoxication manslaughter, it is "a species of lesser included offense" of intoxication manslaughter as a matter of Texas law. TEXAS CODE CRIM. PRO. ANN. Art. 37.09(1). **See *Girdy v. State***, 213 S.W.3d 315, 317 (Tex.Crim.App. 2006); ***Ex parte Cavazos***, 203 S.W.3d 333, 336 (Tex.Crim.App. 2006) ("allowable unit of prosecution" for purposes of double jeopardy for assaultive offenses is each victim). Accordingly, Petitioner could not have been prosecuted for the greater offense of intoxication manslaughter following his conviction for the lesser offense of aggravated assault. The court of appeals' belief that Petitioner's right to counsel had not attached to the then uncharged offense of aggravated assault is, therefore, in conflict with what this Court held in ***Cobb***.[7]

D. Because Petitioner's Right to Counsel had Attached to the Offense of Aggravated Assault, Wilson's Deliberate Elicitation of Incriminating Information from Petitioner Violated this Court's Decision in *Fellers*

The court of appeals also held that Petitioner's ***Sixth*** Amendment claim lacked merit because Wilson's questioning was not "reasonably likely to elicit an incriminating

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[7] Lost in the court of appeals' misguided reliance on ***Cobb***, is the fact that even though the burglary in ***Cobb*** was part of the same transaction as the capital murder, the two crimes were, as this Court correctly held, not the "same offenses" under ***Blockburger***, ***Brown***, ***Harris***, ***Vitale***, ***Dixon***, or even Art. 37.09(1). Unlike the offenses of aggravated assault and intoxication manslaughter, burglary of a habitation is not a lesser included offense of capital murder, which in ***Cobb*** was defined as the murder of two people during the same criminal transaction. **See TEXAS PENAL CODE**, Sec. 19.03(a)(7)(A). This critical distinction irreparably tainted the court of appeals' *sua sponte* disposition of Petitioner's Sixth Amendment claim.

response." *Pet. App.* 10. As the block quote from ***Innis*** set out on page 5, *supra*, shows, however, that is the "interrogation" standard under the ***Fifth*** Amendment. Long before ***Fellers***, this Court consistently applied a lesser "deliberate-elicitation" standard in a number of post-***Massiah*** Sixth Amendment cases. **See *United States v. Henry***, 447 U.S. 264, 270 (1980) ("The question here is whether under the facts of this case, a Government agent 'deliberately elicited' incriminating statements . . . within the meaning of ***Massiah***"); ***Brewer v. Williams***, 430 U.S. 387, 399 (1977) (finding a Sixth Amendment violation where a detective "deliberately and designedly set out to elicit information from [the suspect]"). Moreover, it has expressly distinguished the "deliberate elicitation" standard from the more stringent Fifth Amendment "custodial-interrogation" standard. **See *Michigan v. Jackson***, 475 U.S. 625, 632 n. 5 (1986) ("[T]he Sixth Amendment provides a right to counsel . . . even when there is no interrogation and no Fifth Amendment applicability"); ***Rhode Island v. Innis***, 446 at 300 n. 4 ("The definitions of 'interrogation' under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchangeable").

Viewed through this prism, the court of appeals' is squarely in conflict with ***Fellers*** and its progeny. Not only was Wilson a government agent as required by ***Massiah***, he deliberately elicited[8] incriminating information from Petitioner without his counsel being present in violation of ***Fellers***. **See also *Maine v. Moulten***, 474 U.S. 159, 176

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[8] "Elicit" means "to succeed in getting information from a person." DICTIONARY.COM. It also has been defined as "to draw or bring out or forth" or to "evoke." MERRIAM-WEBSTER ONLINE DICTIONARY.

(1985) ("knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity"). Because the court of appeals' holding is not only in conflict with ***Cobb***, but improperly substituted the more narrow Fifth Amendment standard of "interrogation" for the more expansive Sixth Amendment standard of "deliberate elicitation" embodied in ***Fellers***, this Court should grant certiorari.

CONCLUSION

For all of the foregoing reasons, Petitioner requests that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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2006 WL 2795250

NO. 07-04-0479-CR

IN THE COURT OF APPEALS

FOR THE SEVENTH DISTRICT OF TEXAS

AT AMARILLO

PANEL B

SEPTEMBER 29, 2006

GREGORY BANNISTER, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

FROM THE 154TH DISTRICT
COURT OF LAMB COUNTY;

NO. 3900; HONORABLE FELIX KLEIN, JUDGE

Before QUINN, C.J., and CAMPBELL and HANCOCK, JJ.

OPINION

The primary issue presented in this appeal is whether the procedural protections set out in *Miranda v. Arizona* and Article 38.22 of the Texas Code of Criminal Procedure are applicable to appellant's statement to a jailer concerning the charges against him. The second issue concerns admission of evidence of cocaine use and withdrawal. Rejecting appellant's arguments on both issues, we affirm.

Factual and Procedural Background

On a Saturday morning in May 2002 appellant Gregory Bannister was driving with a friend from Lubbock to his home in Clovis, New Mexico. Near the city of Amherst his vehicle left the roadway, striking and killing a bicyclist on the shoulder. Appellant was present when deputies and DPS troopers arrived and he consented to collection of a blood sample. Because there was no indication he was intoxicated, appellant was not arrested. The sequence of events leading to his subsequent arrest is not clear from this record. It does show that testing of appellant's blood indicated the use of cocaine and he was charged with intoxication manslaughter and aggravated assault under two different cause numbers. This record concerns appellant's trial and conviction for aggravated assault and punishment, enhanced by prior convictions, of 30 years confinement.[1]

During trial the State sought to introduce testimony from Lamb County deputy sheriff Shaun Wilson that appellant had made a statement indicating he had used cocaine within a day before the collision. After voir dire of Wilson the defense objected on the basis the statement was the result of custodial interrogation without "proper warnings," in violation of his right to counsel, and the State had failed to give timely notice of its intent to call Wilson. The trial court overruled the objections. Wilson testified that while appellant was confined in the Lamb County jail in November 2003 he took appellant and another inmate to a clinic for medical treatment. According to Wilson, in the

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[1] Disposition of the manslaughter charge is not shown in this record.

clinic's waiting room, while appellant was "talking in general to the other inmate and maybe a nurse. . . . I happened to ask him what he was incarcerated for." Appellant replied "he was being charged with Intoxicated Manslaughter." Wilson asked if the events occurred near the town of Earth. Appellant said it "happened on [highway] 84 up by Amherst." After further defense objections the court recessed for the evening to give the defense an opportunity to investigate the testimony.

The State recalled Wilson during rebuttal.[2] Wilson was asked again about appellant's answer to his first question and replied: "He responded that he was in jail for Intoxicated Manslaughter." Wilson testified appellant then "stated that he didn't understand why he was being charged with Intoxicated Manslaughter if he had used cocaine the day before." Wilson testified he did not document the statement at the time or take any steps then to make an investigator or prosecutor working on the case aware of it. The prosecutor only learned of the statement during a lunchtime conversation the Friday before trial. The prosecutor asked Wilson to reduce his recollection of the event to writing and provided a copy to defense counsel the same afternoon.

The State's rebuttal evidence also included testimony from Brian Cantrell, the other inmate at the clinic. Cantrell's testimony supported Wilson's version of events. He recalled that appellant asked Wilson, "How can they charge me with Intoxicated Manslaughter when I wasn't

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[2] A defense expert testified that no conclusion could be drawn about when appellant consumed cocaine based on the analysis of his blood.

drunk, when I was on cocaine at the time." According to Cantrell that statement was not in response to questioning by Wilson.[3]

Custodial Interrogation

Appellant's first four points advance different theories why admission of the evidence of his November 2003 statement was error. Point one rests on Article 38.22 of the Texas Code of Criminal Procedure. Point two asserts violation of his Sixth Amendment right to counsel. In point three he asserts violation of his Fifth Amendment right against self-incrimination and point four complains of the State's failure to timely disclose the statement. We review challenges to a trial court's evidentiary rulings for abuse of discretion. *McDonald v. State,* 179 S.W.3d 571, 576 (Tex.Crim.App. 2005). That standard requires us to give almost total deference to a trial court's determination of historical facts that find support in the record. *State v. Ross,* 32 S.W.3d 853, 855 (Tex.Crim.App. 2000) (suppression hearing); *Guzman v. State,* 955 S.W.2d 85, 89 (Tex.Crim.App. 1997).

In *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Supreme Court prohibited the prosecution's use of statements stemming from custodial interrogation unless it demonstrated the use of procedural safeguards to protect the accused's right against self incrimination. *Id.* at 444. Article 38.22 of the Code of Criminal Procedure imposes additional procedural steps

[3] At the time of appellant's trial Cantrell had discharged his sentence and testified he was not subject to probation, parole or pending charges.

designed to protect the same rights and, with a limited exception not applicable here, prohibits use of statements made as a result of custodial interrogation when the enumerated procedures are not followed. Tex. Code Crim. Proc. Ann. art. 38.22 (Vernon 2005). Section 5 of Article 38.22 reiterates that statements which do not result from custodial interrogation are not subject to exclusion. The parties agree the procedures described in *Miranda* and set out in article 38.22, section 3 (governing oral statements) were not followed by Wilson. They also agree appellant was in custody at the time of the statements. Their dispute, and resolution of appellant's first and third points, turn on whether the statements were the result of interrogation.

Appellant relies primarily on the holding in *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), and cases following it holding "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." *Id.* at 301. It defined an incriminating response to include any response the prosecution may seek to introduce at trial. *Id.* at 301 n.5. The defendant in *Innis* was arrested for a shooting where police believed he had discarded the murder weapon near a school. While transporting Innis to the police station after he had been given the warnings required by *Miranda,* officers discussed the importance of finding the gun before it was discovered by schoolchildren. *Id.* at 294-95. Innis told the officers to turn back and he would show them where the gun was. *Id.* at 295. Innis later argued the statement was the product of custodial interrogation and

inadmissible. The court rejected that contention, holding the conversation between the officers was neither express questioning of Innis or its "functional equivalent." *Id.* at 302. It found the officers' statements "offhand remarks" not reasonably likely to elicit an incriminating response. *Id.* at 303.

The record does not support appellant's conclusion that Wilson should have known the questions he asked were reasonably likely to elicit an incriminating response. A response to Wilson's first question would not be incriminating under the broad definition of that term in *Innis*. *But see Etheridge v. Johnson,* 49 F.Supp.2d 963, 981-82 (S.D. Tex. 1999) (arresting officer asked if defendant knew why he was being arrested). That appellant knew the charge against him was not a fact the State would seek to introduce at trial. Had Wilson asked what appellant had done, rather than what he was charged with, the question would likely have elicited an incriminating response. *See, e.g., U.S. v. Webb,* 755 F.2d 382, 389 (5th Cir. 1985) (booking officer asked "what . . . did you get yourself into?"). The same is true for Wilson's second question about the location of events leading to the charge. Both witnesses to the conversation who testified asserted appellant's statement concerning cocaine use was not in response to any question from Wilson.[4]

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[4] During defense counsel's voir dire examination of Wilson, he described the context of appellant's statements in the waiting room, stating, "He wasn't talking to me in general. He was speaking out loud to, basically, anybody that would listen to him. There was another inmate in the room at that time and I think the nurses were around as well."

We do not agree the facts presented here are more similar to cases cited by appellant where reviewing courts have found police conduct was the functional equivalent of express questioning. The distinguishing factor is that in those cases the statements were made to officers who were investigating the offense for which the defendant was in custody. In *Wortham v. State,* 704 S.W.2d 586, 589 (Tex.App. – Austin, 1986, no pet.), the statement at issue occurred during a conversation between sheriff's deputies and the defendant on the way to jail. The officers admitted the conversation included questions about the shooting they were investigating, but contended the statement at issue was not in response to a question but "almost an afterthought." *Id.* at 588. The officers' questions about the shooting showed they were investigating the offense and the court held the statement was the result of custodial interrogation. *Id.* at 589.

The Eastland Court of Appeals followed *Wortham* in *Baxter v. State,* 718 S.W.2d 28 (Tex.App. – Eastland 1986, pet. ref'd), holding statements made to officers during their search of a trailer containing a clandestine drug lab shortly after the defendant's arrest were the result of interrogation. On evidence the officers asked the defendant questions concerning the operations at the trailer, the court rejected the officers' claim the statements were made in "general conversation." *Id.* at 33. An investigating officer's statements to a defendant in an emergency room that another person involved in a traffic accident had died and the officer wanted to talk with the defendant about the accident were found to constitute interrogation in *Clemmer v. State,* 645 S.W.2d 918, 919 (Tex.App. – Fort Worth 1983, no pet.). Following *Innis,* the court found the officer's statements reasonably likely to elicit an

incriminating response and reversed the conviction. *Id.* at 920. *See also Etheridge,* 49 F.Supp.2d at 982 (arresting officer asked defendant if he knew why he was under arrest); *Castleberry v. State,* 100 S.W.3d 400, 404 (Tex.App. – San Antonio 2002, no pet.) (post-arrest question by investigating officer at scene about ownership of weapon was interrogation, precluding admission of the defendant's response in his prosecution for weapons offense).

By contrast, evidence shows Wilson had no involvement in the investigation of the charges against appellant.[5] The statements to which Wilson testified were made some eighteen months after the May 2002 death of the bicyclist.

In *Innis* the Court recognized that an officer's intent may have a bearing on whether he should have known his words or actions were reasonably likely to elicit an incriminating response. *Innis,* 446 U.S. at 301 n.7. *See also Wilkerson v. State,* 173 S.W.3d 521, 528-30 (Tex.Crim.App. 2005) (discussing application of *Miranda* and art. 38.22 to questions by state agent not participating in criminal investigation). The jailer in *Webb* placed himself into the law enforcement role by admitting he "saw his own role as one of helping in the FBI's investigation in whatever way he could," and by informing investigators of the defendant's statement. 755 F.2d at 389. The circumstances of appellant's statements in the waiting room of the clinic and Wilson's failure to record the statement or report it to

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[5] Questioned during his voir dire examination about his reaction to appellant's statements, Wilson testified, "Whenever he made that statement it – I didn't know what effect it would have on the case or I didn't know what kind of evidence they had or anything like that. A lot of times they may talk about their cases out loud."

investigators or the prosecutor further indicate he had no intent to act in an investigative capacity. The record supports a finding appellant's statement was not the result of interrogation. We overrule appellant's first and third points of error.

Appellant's second point asserts admission of the statement violated his Sixth Amendment right to counsel. Protection of that right prohibits police from eliciting incriminating statements from a defendant concerning the pending charge after the defendant's right to counsel attaches, which occurs on commencement of adversarial proceedings. *Fellers v. U.S.,* 540 U.S. 519, 523, 124 S.Ct. 1019, 157 L.Ed.2d 1016 (2004); *Kirby v. Illinois,* 406 U.S. 682, 688-90, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). Custody of a defendant is not necessary to a Sixth Amendment violation. *Innis,* 446 U.S. at 300.

Appellant relies on the argument advanced under his first point to establish Wilson's conduct was designed to elicit incriminating statements in violation of his Sixth Amendment right to counsel. The State's brief contains no discussion of appellant's Sixth Amendment claim. We initially note the Sixth Amendment right to counsel is offense-specific. *Texas v. Cobb,* 532 U.S. 162, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001); *Romo v. State,* 132 S.W.3d 2, 3 (Tex.App. – Amarillo 2003, no pet.). Even if Wilson's conversation with appellant were reasonably likely to elicit an incriminating statement, it concerned the charge of intoxication manslaughter. Admission of that evidence in his trial for aggravated assault, for which he apparently

had not yet been indicted,[6] would not be barred under the Sixth Amendment. *Id.* Moreover, for the reasons discussed, the record supports a conclusion that Wilson's questions to appellant were not designed or reasonably likely to elicit incriminating information. We overrule appellant's third point.

Appellant's fourth point of error complains of the State's failure to timely disclose his statement to the defense. He argues evidence of the statement should have been excluded because it was not disclosed to defense counsel until the second day of trial in violation of a pretrial order issued under article 39.14 of the Code of Criminal Procedure (Vernon 2005). The trial court order required disclosure of, *inter alia,* "all oral confessions, admissions and statements made by Defendant to the state in connection with this case, which were not electronically recorded[,] offense reports, police reports [and] reports of third parties . . . involving the alleged facts of the offense."

Article 39.14(a) authorizes a trial court to order the State to produce documents, written statements of the defendant and tangible objects under the control of the State which are relevant to the action. Tex. Code Crim. Proc. Ann. art. 39.14(a) (Vernon 2005). An order under that article "shall specify the time, place and manner of

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[6] Appellant's indictment for aggravated assault appearing in the appellate record is dated in January 2004, after his November 2003 conversation with deputy Wilson. Wilson and Brian Cantrell testified appellant's statement during that conversation was to the effect he had been indicted for "intoxicated manslaughter." Nothing in the record makes clear whether appellant's earlier indictment included the aggravated assault charge.

making the inspection[.]" *Id.; Kinnamon v. State,* 791 S.W.2d 84, 92 (Tex.Crim.App. 1990), *overruled on other grounds, Cook v. State,* 884 S.W.2d 485 (Tex.Crim.App. 1994).

Appellant's motion did not ask the trial court to set a time for production and the court did not do so. *See Kinnamon,* 791 S.W.2d at 92 (court does not err in failing to set date when there is no request). The record shows Wilson's statement concerning the event was provided to defense counsel the Friday before trial. In the absence of a deadline set by the court, disclosure on the eve of trial has been found timely. *Kirksey v. State,* 132 S.W.3d 49, 54 (Tex.App. – Beaumont 2004, no pet.), *citing Murray v. State,* 24 S.W.3d 881, 893 (Tex.App. – Waco 2000, no pet.). The facts here are indistinguishable from those of *Murray.* There the prosecutor received a witness statement at 5:35 p.m. on the Friday before trial. *Id.* at 893. She forwarded the statement to defense counsel thirty minutes later. The trial started the following Monday and the witness was called on Wednesday. *Id.* The Waco Court of Appeals found no violation of the discovery order and affirmed. *Id.* Finding that holding dispositive, we overrule appellant's fourth point.

Appellant's next three points challenge the admission of expert witness testimony concerning the presence of a cocaine metabolite in his blood and the effect of cocaine withdrawal. He argues the evidence was admitted in violation of Rules of Evidence 401[7] (point five), 702 (point

[7] Trial defense counsel's objection to Erwin's testimony referred to Rule 401, which defines relevant evidence. It is Rule of Evidence 402 that makes evidence which is not relevant inadmissible.

six), and 403 (point seven). The disputed evidence was the testimony of Department of Public Safety chemist Kathy Erwin, who analyzed the blood collected from appellant. She found it contained .36 milligrams per liter of benzoylecgonine. This chemical is produced when the body metabolizes cocaine. Benzoylecgonine has no effect on the body but indicates cocaine had been present. According to Erwin the presence of benzoylecgonine does not indicate how or when the cocaine was ingested.[8] Erwin went on to testify that cocaine is a potent stimulant which can lead to a "crash phase" or "crash effect" during withdrawal where the user can experience fatigue and sleepiness and a general lack of energy.[9] The effect can exist even when the cocaine is no longer present.

Erwin was not asked for an opinion whether appellant had experienced cocaine crash or withdrawal. Except for her identification of appellant's blood sample and her recitation of the procedures utilized in the DPS lab and results of her analysis, Erwin's testimony was not related directly to appellant.

The defense presented expert testimony from toxicologist James Booker. His testimony was consistent with that of Erwin on the source of benzoylecgonine and the general scientific recognition of a cocaine crash or cocaine withdrawal. He agreed that effect can last from several hours to several days, but opined an occasional user of small amounts of cocaine would not suffer a withdrawal effect.

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[8] Appellant's expert testified benzoylecgonine is normally present for two or three days, but that some reported cases found detectible amounts after two or three weeks in chronic cocaine users.

[9] She said that among its effects, cocaine "keeps you awake."

When asked what information was needed to determine the effect of a drug on a person, he replied that for cocaine it would require information on when it was used, how much was used and the means by which it was administered, adding that information was not available in this case.

Following the plain language of Rule 401, appellant argues by his fifth point Erwin's testimony did not have any tendency to make a fact of consequence to the determination of the action more or less probable because it did "not establish that he was under the influence of cocaine when he struck the decedent." This argument misapprehends the State's theory at trial and the purpose of Erwin's testimony. It was not the State's theory that appellant was under the influence of cocaine at the time of the collision, but that he was fatigued and sleepy because he was suffering withdrawal from cocaine. This theory was within the indictment allegation that appellant operated a motor vehicle "without sufficient sleep, as a result of the introduction of cocaine into his body[.]"[10] Erwin's testimony was relevant because it established scientific acceptance of the effects of cocaine withdrawal. It also showed appellant had consumed cocaine in the recent past. That the testimony did not establish when the cocaine was consumed or conclusively establish appellant experienced cocaine withdrawal at the time of the collision did not make it inadmissible. As the Court of Criminal Appeals has explained, the insufficiency of a particular item of evidence, standing alone, to prove a fact does not make it inadmissible.

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[10] Because the use of cocaine was alleged in the indictment, evidence of that use was not an extraneous offense. *Manning v. State*, 114 S.W.3d 922, 927 (Tex.Crim.App. 2003).

Manning, 114 S.W.3d at 927. We overrule appellant's fifth point.

In his sixth point appellant challenges admission of Erwin's testimony because the State failed to establish the reliability of that testimony. When a party offers testimony of an expert witness, it is the trial court's responsibility to determine if the evidence is sufficiently reliable to assist the jury. *Sexton v. State,* 93 S.W.3d 96, 99 (Tex.Crim.App. 2002). Appellant argues the State "failed to shoulder its burden of showing that [E]rwin's technique applying the cocaine crash theory was valid and that the technique had been properly applied in this case." As noted, however, Erwin's testimony did not apply the cocaine crash theory to appellant. Before the jury, she was not asked if appellant had experienced cocaine crash or withdrawal.[11]

The State showed Erwin had bachelor's and master's degrees in chemistry, had taken additional graduate courses in forensic toxicology and had over 20 years experience in the field of chemistry, with five of those in the DPS crime laboratory. She also identified literature reporting studies on the effects of cocaine use. Appellant presents no challenge to the reliability of Erwin's testimony about her analysis of his blood, that concerning the metabolite benzoylecgonine, or that describing the effects on the body of cocaine use and cocaine withdrawal. His

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[11] Erwin was not directly asked if appellant had used cocaine. She testified appellant's blood sample contained the metabolite benzoylecgonine and that benzoylecgonine is produced in the body only following cocaine use. She agreed with the prosecutor that, from the presence of benzoylecgonine in a person's body, she could tell that cocaine "was used."

challenge is to testimony that Erwin did not give. We overrule appellant's sixth point.

In his final point of error appellant argues that even if the evidence of the presence of benzoylecgonine was relevant, it should have been excluded because the probative value was substantially outweighed by the danger of unfair prejudice. *See* Tex. R. Evid. 403. In reviewing an objection to evidence under Rule 403, a court should consider, but is not limited to, the following factors: (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational, yet indelible, way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence. *Prible v. State,* 175 S.W.3d 724, 733 (Tex.Crim.App. 2005); *Manning,* 114 S.W.3d at 926. Appellant's argument reiterates the contentions regarding relevancy urged in support of his fifth point. His argument challenges the Court of Criminal Appeals' analysis of similar evidence in *Manning,* and its conclusion the failure to exclude such evidence under Rule 403 was not error. We find the analysis and holding in *Manning* dispositive and overrule appellant's seventh point.

Having overruled appellant's points of error, we affirm the trial court's judgment.

James T. Campbell
Justice

Do not publish.

Cause No. 3900

The State of Texas vs.: **GREGORY BANNISTER**

Bond $: 10,000
Continue under Cause 3744

Charge: Aggravated Assault
1st Degree Felony

Court: 154th District Court
Lamb County, Texas

(Filed Feb. 16, 2004)

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURY, for the County of Lamb, State of Texas, duly selected, empaneled, sworn, charged, and organized as such at the January Term A.D. 2004 of the 154th Judicial District Court for said County, upon their oaths present in and to said court at said term that

GREGORY BANNISTER

hereinafter styled Defendant, on or about the 11th day of May, 2002, and before the presentment of this indictment, in the County and State aforesaid, did then and there:

I.

then and there intentionally, knowingly, or recklessly cause serious bodily injury to B.J. Mitchell by failing to control a motor vehicle or by driving a motor vehicle without sufficient sleep, as a result of the introduction of cocaine into his body and thereby caused his motor vehicle to collide with B.J. Mitchell.

II.

And it is further presented that the Defendant used or exhibited a deadly weapon, to-wit: a 1984 Oldsmobile car,

during the commission of or immediate flight from said offense.

III.

In Cause #95-CR-12383, the Defendant, in the 9th Judicial District Court of Curry County, New Mexico was duly and legally convicted in said last named Court of Trafficking A Controlled Substance, to-wit: Cocaine, a Felony, and said conviction became final prior to the commission of the offense charged in this cause.

against the peace and dignity of the State.

/s/ Robert Grant
Foreman of the Grand Jury
January Term 2004

Cause No. 3744

The State of Texas vs.: **GREGORY BANNISTER**

Charge: Intoxication Manslaughter
2nd Degree Felony

Bond $: 50,000
Court: 154th District Court
Lamb County, Texas

(Filed Mar. 07, 2003)

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURY, for the County of Lamb, State of Texas, duly selected, empaneled, sworn, charged, and organized as such at the January Term A.D. 2003 of the 154th Judicial District Court for said County, upon their oaths present in and to said court at said term that

GREGORY BANNISTER

hereinafter styled Defendant, on or about the 11th day of May, 2002, and before the presentment of this indictment, in the County and State aforesaid, did then and there:

operate a motor vehicle in a public place while intoxicated by not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body, and did by reason of such intoxication cause the death of another, namely, B.J. Mitchell, by accident or mistake, to-wit: by driving said motor vehicle into the person of B.J. Mitchell.

against the peace and dignity of the State.

/s/ Dean Allen
Foreman of the Grand Jury
January Term 2003

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

Wednesday, February 28, 2007 [POSTAGE MARK]
Re. Case No. PD-1861-06
COA#: 07-04-00479-CR
STYLE: BANNISTER, GREGORY

On this day, the Appellant's petition for discretionary review has been refused.

Louise Pearson Clerk

BRIAN W. WICE
ATTORNEY AT LAW
THE LYRIC CENTRE
440 LOUISIANA ST. STE. 900
HOUSTON TX 77002-1635

OFFICIAL NOTICE FROM COU [OBSCURED]
P.O. BOX 12308, CAPITOL [OBSCURED]

4/18/2007 [POSTAGE MARK]
COA#: 07-04-00479-CR
RE: Case No. PD-1861-06
STYLE: BANNISTER, GREGORY

On this day, the Appellant's motion for rehearing has been denied.

Louise Pearson, Clerk

Brian W. Wice
Attorney At Law
The Lyric Centre
440 Louisiana St. Ste. 900
Houston, TX 77002-1635

Trial on Merits
September 14, 2004

REPORTER'S RECORD
VOLUME 4 OF 8 VOLUMES
TRIAL COURT CAUSE NO. 3900

THE STATE OF TEXAS	)	IN THE DISTRICT COURT
VS	)	COUNTY, TEXAS
GREGORY BANNISTER	)	154TH JUDICIAL DISTRICT

TRIAL ON MERITS

* * *

[190] Q. Now, you're claiming that Mr. Bannister made a statement to you; is that correct?

A. Yes, ma'am.

Q. Can you tell me the circumstances in which that statement allegedly was made?

A. While he was incarcerated at our jail we transported him to the Littlefield Health Clinic and while in the waiting [191] room over there is when he made the statement.

* * *

[192] Q. So there's no documentation that you're actually the officer that took him that day?

A. No.

Q. We just have your word for it?

A. (Witness nods head affirmatively.)

Q. Do you understand that Mr. Bannister was incarcerated from September 2003 until December 2003, approximately that amount of time?

A. Yes.

* * *

[193] Q. And you're saying that he wasn't speaking directly to you?

A. We were talking but I kind of interrupted him while he was talking out there with everybody else and I heard him talking about his case and other things going on in the jail and that's when I asked him, you know, what he was incarcerated in our jail for.

Q. And what did he tell you?

A. He told me that he was in jail for, I believe he said Intoxicated Manslaughter at that time, and he later on said that he didn't understand why he was being charged with Intoxicated Manslaughter if he hadn't been drinking but had used cocaine.

Q. And you're aware that he had an attorney appointed to him at that time; is that correct?

A. At the time he made that statement I didn't know.

MR. SAY: I'm sorry, was that did or did not?

[194] THE WITNESS: I did not.

* * *

MS. FRENCH: Your Honor, I'm also going to [195] object because it was a statement made, to a sheriff's deputy while in custody, he had an attorney appointed to him.

THE COURT: Okay.

MS. FRENCH: And without any proper warnings – or Statutory Warnings given, it's all but a confession.

MR. SAY: It's also a res gestae statement that was not elicited by any questioning by the officer, he made the statement of his own free will, he was not under custodial interrogation, there was other people present he was speaking to and it doesn't meet the definition of interrogation in Rhode Island Vs. Innis or any of the other – Lara Vs. State or Arizona Vs. ~~Morrow~~ [sic] [Mauro]

* * *

[196] THE COURT: Okay. I'll allow you to – your objection is overruled. You can check into this information and find out how quickly you can verify this information and let me know.

* * *

[199] MR. YARBROUGH: Something that I didn't think about a minute ago. He was charged with Intoxicated Manslaughter; now, that is an extraneous offense as well. I didn't know if you needed to have him not –

MR. SAY: It's not extraneous, it's part of the same transaction.

MS. FRENCH: No, it's extraneous because –

MR. SAY: No, it's not. It's the same course of conduct, it's a separate offense but it's all in the same course, it's not an extraneous –

MR. YARBROUGH: I just didn't want to – we didn't address that awhile ago and I didn't want to blurt that out.

THE COURT: Okay.

MR. SAY: My understanding is, if it's all a part of the same transaction then it's not an extraneous offense.

MS. FRENCH: Your Honor, Intoxicated Manslaughter was not charged in the indictment, it's not charged. It says that he was falling [sic] to operate a vehicle where he drove without adequate sleep because of cocaine. This isn't even part of the indictment, intoxicated Manslaughter.

[200] MR. SAY: Doesn't matter.

MR. YARBROUGH: Well, that's true, it's not part of this indictment, it's part of the other – his other case, I think 3744 he has pending against him. I didn't think about this awhile ago on how to approach it and I thought before we did anything –

THE COURT: It's the same transaction.

MR. YARBROUGH: It is charged out of the same transaction, there's no question on that.

* * *

[202] MS. FRENCH: Your Honor, once again, the defense renews the objection that this is a statement made while in detention, in custody. The proper Sixth

Amendment rights and other due process rights were not afforded to this inmate. Also, that it is inherent reliability in the failure of the state to provide adequate sufficient notice of this witness before trial.

THE COURT: Objection's overruled.

[203] MR. SAY: Thank you.

Q. (By Mr. Say) So you said the defendant was making statements; what was he talking about?

A. I don't remember exactly what all he was talking about, but I did just in general conversation ask him what he was being incarcerated for in our jail at that time.

MS. FRENCH: And Your Honor, I at this time object as to extraneous conduct being admitted in court.

THE COURT: It's overruled.

Q. (By Mr. Say) Okay, you can continue. You asked him what?

A. Asked him what he was incarcerated for in our jail at that time.

Q. What was his response?

A. He said he was being charged with Intoxicated Manslaughter.

Q. Did he say anything else?

A. I asked him – at first I didn't remember who he was or anything and he stated that he was the one who ran over –

MS. FRENCH: I'm going to object, Your Honor. This is not what's in his statement here.

THE COURT: Okay. I'm going to ask the jury to step out just a moment.

(Jury not present)

THE COURT: All right. You can be seated. [204] We're outside the presence of the jury. Defendant, defendant's counsel, state's counsel are all present in the courtroom. Ms. French?

MS. FRENCH: Your Honor, I'm having a problem with this because he just earlier testified that none of this was stated in direct response to his questioning and now he's sitting here testifying in front of the jury that he's asking direct questions to Mr. Bannister and Mr. Bannister's making direct responses, they are having a conversation.

THE COURT: All right. As far as the response of Mr. Bannister to not drinking but using cocaine, was that in response to a question that you had asked him?

THE WITNESS: No.

THE COURT: Okay. And what was the question that you had asked him most immediately before that statement?

THE WITNESS: I don't remember exactly what I asked him. It was probably something along the lines of – at that time we had another inmate incarcerated in the jail for Intoxicated manslaughter as well and I might have asked him if he was the one that got arrested out by the Earth area and that's when he stated that, no, he was the one that got – it that happened on 84 up by Amherst.

THE COURT: Okay

* * *

[206] BY MS. FRENCH:

Q. Were you asking Mr. Bannister questions?

[207] A. If I did ask him questions it was like the one I just asked. I wasn't carrying on a full conversation, I was just kind of in and out of his conversation.

Q. You were asking him questions, so what was the first question you asked him?

A. I don't remember.

Q. What was the second question you asked him?

A. I wouldn't remember. The only – the statement that I made earlier, that's the only thing I can remember.

Q. So the only thing you an remember is he made this general voluntary statement incriminating him to you but you can't remember what you asked to cause this statement to be made?

A. That statement he made just kind of stuck out in my mind, I don't remember anything else he made. The reason why that stuck out in my mind is because I felt – you know, it just kind of seem a little bit humorous to me that he thought that alcohol is the only way that you could be intoxicated.

MS. FRENCH: I'm just going to object. I mean, it's just – we didn't receive fair notice of this, this is prejudicial, and we just didn't receive any kind of discovery on this. I wasn't able to talk to this witness or check into the validity of what he was saying and he's given conflicting testimony in less than 30 minutes, three different stories.

MR. SAY: All of which goes to weight rather [208] than admissibility. Ms. French has had notice.

THE COURT: Okay. Now, Mr. Wilson, tell me what questions that you recall asking the defendant.

THE WITNESS: The only question that I can remember that would be, you know, was he the one that was involved in the manslaughter case up in the Earth area.

THE COURT: Okay. That would be your second question, I presume; is that – I mean, your first question that you testified to was, why are you in custody?

THE WITNESS: Oh, yes, sir, that's correct.

* * *

Trial on Merits
September 15, 2004

REPORTER'S RECORD
VOLUME 5 OF 8 VOLUMES
TRIAL COURT CAUSE NO. 3900

THE STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	COUNTY, TEXAS
GREGORY BANNISTER	)	154TH JUDICIAL DISTRICT

TRIAL ON MERITS

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* * *

[195] DIRECT EXAMINATION

BY MR. SAY:

Q. Would you please state your name for the record?

A. Brian Cantrell.

* * *

[196] Q. And Brian, have you ever been incarcerated in the Lamb County Jail?

A. Yes, sir.

Q. And were you incarcerated in the Lab County jail around November 4th of 2003?

* * *

[197] Q. During the time that you were incarcerated in the Lamb County Jail did you ever become familiar with an inmate named Greg Bannister?

A. I met him a couple of times going back and forth to the doctor.

* * *

[198] Q. Okay. Do you recall if anyone else was present with yourself and the defendant at that time?

A. Shaun Wilson.

Q. Okay. Who is Shaun Wilson?

A. He's a deputy for Lamb County.

Q. (By Mr. Say) Let me ask this first. Did – was Deputy Wilson questioning the defendant?

A. No, sir.

Q. Did it appear to you that the defendant was being [199] interrogated?

A. No, sir.

Q. How would you describe what was going on?

A. Mr. Bannister was just asking questions about his case and everything like that.

Q. What did the defendant ask Deputy Wilson?

A. I'm not real sure how he said it.

MS. FRENCH: I'm going to object unless he's absolutely certain what he's testifying to. If he's just speculating based on his memory then the defense objects.

THE COURT: Okay. If you can testify as to anything that you actually recall. You'll not speculate –

THE WITNESS: Yes, I can.

THE COURT: All right. You may proceed.

A. I don't know how it went about. He was asking questions to Officer Wilson and he asked him. "How can they charge me with Intoxicated Manslaughter when I wasn't drunk, when I was on cocaine at the time?"

* * *

[207] BY MR. SAY:

Q. Deputy Wilson, you were previously been sworn. I think you were testifying yesterday concerning a trip to the Lamb Health Care Clinic in which the defendant Greg Bannister, you escorted him out there; is that correct?

A. Yes, sir.

Q. Do you recall approximately when that was or do you [208] recall what day it was?

A. I believe it might have been on November 4th of 2003.

Q. Okay. At that time Mr. Bannister was in custody; is that correct?

A. Yes, sir.

Q. Were you interrogating Mr. Bannister or interviewing him in relation to the case that's on trial here today?

A. No.

Q. Were you asking him any questions or did you ask him any questions?

A. I asked him in the room what he was in jail for at that time.

Q. And did he respond to that question?

A. He responded that he was in jail for Intoxicated Manslaughter.

Q. Okay. Did you ask him anything else after that?

A. I might have asked him –

MS. FRENCH: I'm going to object as to speculation, Your Honor.

BY MR. SAY:

Q. Did Mr. Bannister make any other statements to you concerning this case?

MS. FRENCH: Your Honor, once again, I'm going to object and renew my objection that I made yesterday and especially raise the issue of voluntariness because he is an [209] official and Mr. Bannister was in his custody at the time that these alleged statements were made.

THE COURT: That's overruled.

BY MR. SAY:

Q. Did Mr. Bannister make any other statements to you at that time concerning this case that's on trial here today?

A. Yes, he stated that he didn't understand why he was being charged with Intoxicated Manslaughter if he had used cocaine the day before.

* * *

[210] Q. Now, do you recall stating yesterday that you had asked several questions of Mr. Bannister when you made this statement?

A. I might have asked him one other question, yes, ma'am.

Q. But you don't recall what that question was?

A. I might have asked him –

Q. Just generally, do you recall what that question was?

A. Yeah. It was about – around that time that he was in our jail we also had another subject that was also being charged with Intoxicated Manslaughter from the Earth area and [211] I might have asked him which one he was but I don't remember the exact wording, I'm not sure.

Q. As far as you know that Intoxicated Manslaughter charge is still spending [sic], right?

A. Yeah.

Q. Now, you said on the stand that he said what, now, when he made this statement?

A. That he didn't understand why he was being charged with Intoxicated Manslaughter if he had used cocaine earlier.

* * *

Trial on Merits
September 16, 2004

REPORTER'S RECORD
VOLUME 6 OF 8 VOLUMES
TRIAL COURT CAUSE NO. 3900

THE STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	COUNTY, TEXAS
GREGORY BANNISTER	)	154TH JUDICIAL DISTRICT

TRIAL ON MERITS

[Final Arguments]

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* * *

[14] MR. YARBROUGH [Prosecutor]:

* * *

[16] You also have Shaun Wilson and Brian Cantrell telling you that. Yeah, [Bannister] told us he used cocaine.

* * *

[22] MR. YARBROUGH [Prosecutor]:

* * *

[24] You've got Shaun Wilson, you've got Brian Cantrell saying, yes. You've got * * * you know the defendant had used cocaine, you know he was coming off cocaine.

* * *

Punishment Phase
September 17, 2004

REPORTER'S RECORD
VOLUME 7 OF 8 VOLUMES
TRIAL COURT CAUSE NO. 3900

THE STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	COUNTY, TEXAS
GREGORY BANNISTER	)	154TH JUDICIAL DISTRICT

PUNISHMENT PHASE

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* * *

[44] THE COURT: The defendant having no legal reason at bar, the defendant having previously come before this Court on a plea of not guilty and having been tried before a jury of his peers who found him guilty of the offense as alleged in the indictment and the Court having received that verdict and accepted that verdict along with a finding of use of a deadly weapon, this Court hereby assess the defendant's punishment at 30 years in the Texas Department of Criminal Justice, Institutional Division. At this time, you're remanded to the custody of the Lamb County Sheriff's Department until such time that he can deliver you to the proper authorities of the state of Texas to begin your sentence. If there's nothing further then we'll be adjourned.

(Court is adjourned.)

BANNISTER'S PETITION FOR DISCRETIONARY REVIEW BEFORE THE TEXAS COURT OF CRIMINAL APPEALS P. 3

(Filed November 30, 2006)

* * *

IV. APPELLANT'S GROUNDS FOR REVIEW

1. The court of appeals erred in holding that Deputy Wilson's repeated questioning of Appellant was not likely to elicit an incriminating response in violation of Appellant's rights under the Fifth Amendment to the United States Constitution and Art. 38.22, V.A.C.C.P.

2. The court of appeals erred in holding that Deputy Wilson's repeated questioning of Appellant was not calculated to deliberately elicit incriminating information from Appellant in violation of his rights under the Sixth Amendment to the United States Constitution.

* * *